

Wubbe v A. W. Chesterton Co., Inc.

2013 NY Slip Op 31396(U)

June 27, 2013

Supreme Court, New York County

Docket Number: 116162/05

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

— Index Number : 116162/2005
WUBBE, WILLIAM ERNEST
vs.
A.W. CHESTERTON CO., INC.
SEQUENCE NUMBER : 011
SUMMARY JUDGMENT
(CRANE)

INDEX NO. 116162/05
MOTION DATE _____
MOTION SEQ. NO. 011

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**is decided in accordance with the
memorandum decision dated 6.27.13**

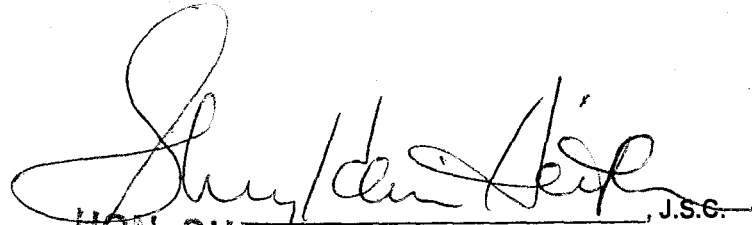
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JUL 02 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6.27.13


HON. SHERRY KLEIN HEITLER, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----- X
GLORIA WUBBE, and TERESA WAITE,
Individually and as Executrix of the Estate
of WILLIAM ERNEST WUBBE,

Index No. 116162/05
Motion Seq. 011

Plaintiffs,

DECISION AND ORDER

-against-

FILED

A.. W. CHESTERTON CO., INC., et al.,

JUL 02 2013

Defendants.

COUNTY CLERK'S OFFICE
NEW YORK

----- X
SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Crane Co. ("Crane") moves pursuant to CPLR § 3212 for summary judgment dismissing plaintiffs' complaint and any cross-claims against it on the ground that there is no evidence that Mr. Wubbe was ever exposed to asbestos as a result of any product manufactured, sold, or distributed by Crane. For the reasons set forth below, the motion is granted.

This action was commenced by William Ernest Wubbe and his wife Gloria Wubbe on November 18, 2005 to recover damages for personal injuries allegedly caused by Mr. Wubbe's exposure to asbestos.¹ Mr. Wubbe was deposed on June 9, 2006 and July 10, 2006. Copies of his deposition transcripts are submitted as defendants' exhibit D ("Deposition"). Mr. Wubbe testified he was employed as an electronic technician working aboard several ships, including the USS Constellation (CV-64) and the USS Saratoga (CV-60), at the Brooklyn Navy Yard from 1951 until 1965. (Deposition pp. 41-43). Mr. Wubbe testified that he mostly worked above deck and in

¹ William Wubbe died on December 27, 2007.

the ships' "electronic spaces" which housed the radar, communication, and fire control systems. (Deposition pp. 46, 55, 63). He also testified that, as a result of his work in close proximity to other trades working on board, including pipe ladders and welders, he was exposed to asbestos-containing welding blankets, gaskets, insulation, wires, and the dust released therefrom. (Deposition pp. 47, 48, 50, 70-71).

The defendant argues that summary judgment should be granted since Mr. Wubbe failed to identify any Crane product as a source of his asbestos exposure. In opposition plaintiffs rely on Mr. Wubbe's testimony as well as documents from both Crane and the United State Navy to show that Crane valves were present on some of the ships on which Mr. Wubbe worked. (Plaintiff's exhibits 1, 3, 4).

The only testimony over two days of deposition that refers to valves was adduced from Mr. Wubbe as follows (Deposition p. 64):

- Q. Sir, do you recall any other tradesman working around you on the Saratoga, using asbestos-containing materials?
- A. Yes.
- Q. And what tradesman were those, sir?
- A. Those were ladders, the welders.
- Q. And what were the ladders doing around you on the Saratoga?
- A. The same as they did on the other ship. They would wrap the pipes, and valves, and joints in the pipes.

This does not identify the manufacturer of the valves nor their location aboard the Constellation or the Saratoga. Plaintiffs submit documents that purport to show that Crane valves were used aboard some of the ships referenced in Mr. Wubbe's testimony. (Plaintiffs' exhibits 3-5). The documents indicate that 85 lb. Crane valves were used aboard the

Constellation, but there is nothing to show where on that class of ship they were installed. Crane valves were also used in connection with the auxiliary steam system piping and were located in the engine rooms aboard the destroyers on which Mr. Wubbe testified he worked. According to his testimony, Mr. Wubbe spent an average of three days working aboard each of several destroyers (Deposition p. 86). However, he described the electronic spaces aboard the destroyers as “clean.” He was in the engine rooms only to pass through them to get from one place to another or to go to the mess hall (Deposition pp. 88-90).

Mr. Wubbe testified with regard to his exposure in the destroyers’ engine rooms as follows (Deposition p. 90):

Q. Do you know whether any men were working with any asbestos-containing material in the engine room, while you were passing by?

A. I was not down there. I don’t know. They could have been. I don’t know, you know.

In order to obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court’s directing judgment in its favor as a matter of law, and must tender sufficient evidence to demonstrate the absence of any material issue of fact.

Zuckerman v City of New York, 49 NY2d 557, 562 (1980). In asbestos-related litigation, once the defendant has made a *prima facie* showing that its product could not have contributed to the decedent’s injury, the plaintiff must then show actual exposure to asbestos fibers released from the defendant’s product. *Cawein v Flinknote Co.*, 203 AD2d 105, 106 (1st Dept 1994). The mere presence of a defendant’s asbestos-containing product at the plaintiff’s work site is insufficient to overcome a summary judgment motion. *Id.* The burden is on the plaintiff to show facts and conditions from which the defendant’s liability may be reasonably inferred. *Reid v*

Georgia Pacific Corp., 212 AD2d 462 (1st Dept 1995). The identity of manufacturer of a defective product may be established by circumstantial evidence but such evidence must not be speculative or conjectural. See *Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 601 (1996).

In this case the defendant has made a *prima facie* showing that plaintiffs have failed to identify a Crane product. Mr. Wubbe's testimony and the documents submitted by plaintiffs are insufficient to rebut such showing or to support a reasonable inference that a Crane valve was within Mr. Wubbe's zone of exposure or that it contributed to his injury. Plaintiffs' claims against this defendant are thus speculative.

Accordingly it is hereby

ORDERED that Crane Co.'s motion for summary judgment is granted, and this action and any cross-claims against the defendant are severed and dismissed in their entirety; and it is further

ORDERED that the remainder of this action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

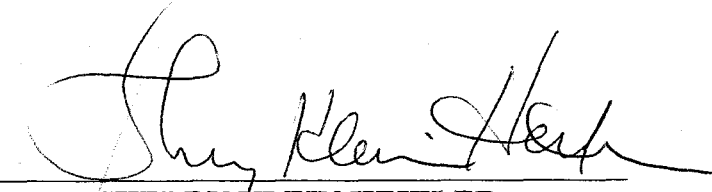
FILED

JUL 02 2013

COUNTY CLERK'S OFFICE
NEW YORK

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DATED: 6.27.13


SHERRY KLEIN HEITLER
J.S.C.